tucky is undertaking to collect the taxes in controversy, as construed and applied by the State court of last resort deprive the appellants of their property without due process of law, contrary to the Fourteenth Amendment to the Federal Constitution.

There has been no change in Judicial Code, section 237, now U. S. Code, Title 28, section 344, which affects the right of appeal in this case. As we see it the appellants have exactly the same right of appeal now that they had when the case was first taken to this court.

Therefore

(a) The statutory provision believed to sustain the jurisdiction of this court is U. S. Code, Title 28, section 344.

(b) The judgment of the Court of Appeals of Kentucky became final on June 5, 1931, when the appellants' petition for rehearing which had been seasonably filed, entertained and considered, was overruled and mandate of reversal issued (Folio 528). Chicago, Great Western R. Co. v. Basham, 249 U. S. 164.

The opinion of the Court of Appeals of Kentucky on the last appeal to that court is contained in the record (Folios 430 to 468, inclusive) (238 Ky. 638).

The date upon which the applications for appeal were presented to the Court of Appeals of Kentucky was June 17, 1931 (Folios 543, 546), and the appeals were then allowed (Folios 551 and 553).

The time for filing the record in the Supreme Court of the United States was extended on June 23, 1931, for ninety days from and after June 5, 1931, by order

signed by the Chief Justice of the Court of Appeals of Kentucky, who was the judge that signed the citations (Folio 566).

This was done in accordance with the provisions of United States Supreme Court rule 11. A certified copy of this order was promptly filed in this court.

(c) The nature of the case is shown by the former opinion of this court. (274 U. S. 76) and also by the judgment entered by the Woodford Circuit Court of Kentucky on November 2, 1928 (Folios 414 to 420, inclusive), which was affirmed by the Court of Appeals of Kentucky in its opinion (Folios 430 to 468, inclusive) (238 Ky. 638), being a proceeding by the Commonwealth of Kentucky to collect franchise taxes from the appellants, Southern Railway Company and Director General of Railroads.

This court in 274 U. S. 76-80, reversed as unconstitutional an assessment for franchise taxes against appellants for 1918 amounting to $1,730,090.02 and for 1919 amounting to $3,028,592.62. The judgment of the Woodford Circuit Court which was affirmed by the Court of Appeals of Kentucky and from which this appeal is taken fixed a franchise assessment against appellants for 1918 amounting to $1,730,090.02 and for 1919, $3,028,592.62 (Folios 416 and 418). It will be seen that the assessments involved on the first appeal to this court are precisely the same as those involved on the present appeal. These assessments and the final judgment upholding same are attacked as contrary to the due process clause of the Fourteenth Amendment

to the Federal Constitution in appellants' assignments of errors (Folios 532 and 537).

The jurisdiction of this court is sustained by U. S. Code, Title 28, section 344, paragraph (a), and the opinion of this court in 274 U. S. 76, construing similar provisions with regard to right of appeal contained in Judicial Code, 237.

The Court of Appeals of Kentucky in its last opinion (Folios 430 to 468, inclusive) (238 Ky. 638) took the position that this court had reversed these cases on the former appeal on account of a defect in the pleadings of the Commonwealth, which has been cured since, when, as will be clearly seen from the opinion rendered by this court above referred to, the cases were not reversed at all on any question of pleading but on the merits.

The reason given by the Court of Appeals of Kentucky for sustaining a judgment which was exactly like the one that this court reversed is based upon a misconception of the following language contained in the opinion rendered by this court in 274 U. S. 81:

> "There was no claim for any taxes in respect of the lines of the Cincinnati, New Orleans and Texas Pacific."

However, when we read this sentence with its context it can be readily seen that this court was not referring to any question of pleading:

> "There was no claim for any taxes in respect of the lines of the Cincinnati, New Orleans and Texas Pacific. That company had also reported its earn-

ings and paid taxes on its tangible and intangible properties in Kentucky. These taxes were based on values per mile in excess of the average values per mile for the system arrived at by capitalization of net railway operating income in accordance with the rule applied by the State. No part of the amounts adjudged to have been omitted could properly be assigned thereto."

The Commonwealth, however, seized upon the language used in the sentence first above quoted and urged upon the Woodford Circuit Court and the Court of Appeals of Kentucky the idea that the cases had been reversed because of an omission in pleading on the part of the Commonwealth, and this view was adopted by the State courts.

The only change which the Commonwealth made in the record after this case was reversed by the Supreme Court of the United States was to file a pleading stating that the Commonwealth did claim taxes with respect of the lines of the Cincinnati, New Orleans & Texas Pacific (Folio 361), when as a matter of fact the Cincinnati, New Orleans & Texas Pacific was not a defendant to the case and it was no more necessary to mention it in the pleadings than any of the other numerous roads which were held to be controlled by the Southern Railway.

To this amendment the appellants filed a responsive pleading again fully raising the constitutional questions relied on (Folio 373), which the Court of Appeals of Kentucky in its last opinion (Folio 430) expressly passed upon adversely to the appellants, the questions

in regard thereto being fully covered by assignments of errors filed by the appellants in connection with this appeal (Folios 532, 537).

The stipulation filed in the Woodford Circuit Court just before the last judgment was entered shows that the assessments for the years in controversy on the first appeal to this court were made up exactly as contended by appellants in this court (Folios 406, 407, 408 and 409). A comparison of the figures used in this stipulation with the figures used in the final judgment from which this appeal is prosecuted (Folios 415, 416, 417 and 418) show that the two sets of figures are identical. There has been no change in the figures used or the method of calculation or in the amounts finally arrived at.

Furthermore, all the facts with reference to the Cincinnati, New Orleans & Texas Pacific were in the record by stipulation when the cases came to this court on the first appeal on writ of error, and this court and the Court of Appeals of Kentucky have held that a stipulation takes the place of both pleadings and proof on the matters covered thereby. Saltonstall v. Russell, 152 U. S. 628; Lincoln County, etc., v. Board of Trustees, 225 Ky. 21-24.

It is unnecessary to look further than the opinion of this court on the first appeal (274 U. S. 76) to show that the cases were reversed on the merits and not on any question of pleading, but we will simply quote the language used in the petition for rehearing filed in this court shortly after its decision was rendered by the Commonwealth of Kentucky through its counsel.

This is what the Commonwealth of Kentucky said in its petition for rehearing when it was trying to get this court to withdraw its opinion of reversal which it had delivered in these cases.

> "These pleadings and this stipulation of facts have always been treated by all parties to this controversy as entirely sufficient to raise the question whether the facts as stated were sufficient to warrant a basis of unit taxation of the entire system, including the C. N. O. & T. P. for the two years mentioned. The question was never raised as to the sufficiency of these pleadings and stipulations. They were always treated as bringing the question fairly and squarely before the court by counsel for both sides and there never has been any exception or question made of the fact that the State of Kentucky was laying a claim for taxes in respect of the C. N. O. & T. P. Railway.
>
> "We submit that the statement in the opinion of this court that there was no claim for any taxes in respect of this line is a serious misstatement of the facts contained in the record. Taxes have always been claimed since these pleadings went into the record and it has always been admitted that if the pleadings and stipulations were sufficient to make out a case then the case was established they were put in for the purpose of testing whether the case really existed."

The Court of Appeals of Kentucky, in affirming the identical judgment that had been reversed by this court, gives two reasons: (1) That the claim for taxes with respect of the lines of the C. N. O. & T. P. is a new matter. This, we submit, has been shown to be without merit. (2) That for a long time past all railroad property in Kentucky has been assessed on the same basis

that this court, as applied to these appellants, has held to be unconstitutional.

The Court of Appeals of Kentucky does not seem to have been able to reconcile itself to the principle announced by this court, namely, that a method for arriving at franchise assessment which might be fair and equitable under certain conditions may be arbitrary, excessive and unconstitutional as applied to other conditions, such as appear in the case at bar.

The mandate of this court reversing the final decision of the Court of Appeals of Kentucky remanded the cases to the State Court with directions for further proceedings not inconsistent with the opinion of this court. We submit that the proceedings had in the State courts since such reversal are absolutely inconsistent with the opinion rendered by the Supreme Court of the United States and cannot possibly be reconciled therewith. It is inconceivable that with no change in the facts the same judgment could be rendered and upheld by the State courts which had theretofore been reversed by the Supreme Court of the United States.

We are firmly convinced that the appellants are entitled to an appeal under U. S. Code, Title 28, section 344, paragraph (a), and we ask that this court take jurisdiction accordingly upon the appeal allowed by the lower court, but in order to make assurance doubly sure we ask that if for any reason that does not occur to us this court should determine that the appellants are not entitled to an appeal, these papers be taken as a petition for a writ of certiorari under U. S. Code,

Title 28, section 344, paragraph (c), and that the writ be allowed accordingly under paragraph (b) of section 344, Title 28, U. S. Code.

Respectfully submitted,

EDWARD P. HUMPHREY,
CHARLES W. MILNER,
Louisville, Ky.,
Counsel for Appellants.

L. E. JEFFRIES,
S. R. PRINCE,
Washington, D. C.,
Of Counsel.